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No. 84-416

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

KATHRYN MAE SWISHER,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

On the Petition for the Writ of Certiorari
to the Tennessee Court of Criminal Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Tennessee Court of Criminal Appeals in the instant case is unpublished and appears in the appendix to petitioner's petition for writ of certiorari to this Court. The Tennessee Supreme Court's denial of permission to appeal the decision of the intermediate appellate court is unpublished and appears in the appendix to petitioner's petition for writ of certiorari to this court.

JURISDICTION

The petitioner seeks review pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED FOR REVIEW

The petitioner essentially presents the following questions for review:

I. Whether the contumacious behavior of the petitioner involved disrespect to or criticism of the trial court which should have prompted the trial court to recuse itself, in accordance with Rule 42(b), Tennessee Rules of Criminal Procedure, from the hearing on the contempt charges, and whether the trial court's failure to recuse itself violated the petitioner's rights to due process under the Fifth and Fourteenth Amendments to the United States Constitution.

II. Whether the petitioner was deprived of notice of the contumacious behavior with which she was charged, in violation of the petitioner's rights to due process under the Fifth and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Fifth Amendment to the United States Constitution:

> . . . [N]or [shall any person] be deprived of life, liberty, or property, without due process of law. . .

2. Fourteenth Amendment to the United States Constitution:

> . . .[N]or shall any state deprive any person, life, liberty, or property, without due process of law. . .

3. Rule 42, Tennessee Rules of Criminal Procedure: Criminal Contempt:

> (a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the district attorney general or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the hearing except with the defendant's consent. Upon a verdict of finding of guilt the court shall enter an order fixing the punishment.

STATEMENT OF THE CASE

On November 9, 1982, the Shelby County Grand Jury returned two indictments against Herman Samuel Phillips, Jr., charging him with aggravated rape and first degree burglary and larceny. The petitioner was counsel of record for Phillips, and Phillips' trial was ongoing on May 24, 1983. During cross-examination of State's witness law enforcement officer James Leroy Campbell by petitioner, petitioner asked the witness if a certain individual [presumably the prosecutrix] had mentioned certain sounds being made by the perpetrator during the rape. Officer Campbell responded that he did not understand the question. The court then began to direct the petitioner to reformulate her question to make it more specific. Before the direction was stated, petitioner interrupted the trial judge, stating to Officer Campbell "I don't know what she said to you". (Appendix D to petitioner's petition for writ of certiorari).

At that point, the trial judge excused the jury from the courtroom and gave what the judge described as a second warning to petitioner not to continue speaking once the court had begun to address her. The trial court indicated that the rule of courtroom decorum applied equally well to the assistant district attorney general prosecuting the case. During the course of the trial judge's admonition to petitioner, the petitioner again interrupted him, and was issued still another, her third, warning. (Appendix D to petitioner's petition for writ of certiorari).

Following the court's warning, petitioner explained that her behavior was the result of concentration, and not disrespect. At that point, the trial judge specifically indicated that a continuation of the interruptions would constitute contempt of court. The court offered petitioner an opportunity to take a recess for the purpose of "settling down" if she needed it. Petitioner declined the offer. (Appendix D to the petition for writ of certiorari).

After the jury returned to the courtroom, the trial judge was again interrupted by the petitioner, who apparently renewed her cross-examination of the police officer prior to the trial judge having an opportunity to complete his determination that all of the correct jurors had returned to the courtroom. After politely requesting counsel to wait until he had finished, the trial judge reiterated that the petitioner could have a recess if one was needed, but the offer was again declined. (Appendix D to petitioner's petition for writ of certiorari).

Following the cross-examination of Officer Campbell, which continued for approximately an hour, the court ordered a ten minute recess. As the jury was retiring, but before all of them had left the courtroom, petitioner loudly asked her client how tall he was. He responded that he was 6 foot 3 inches in height. At that point, the trial judge directed the petitioner not to discuss the case in front of the retiring jurors, and ordered the courtroom deputy to have the assistant district attorney general returned to the courtroom. (Appendix D to petitioner's petition for writ of certiorari).

The trial court then had directed the petitioner to stand and advised her that a contempt of court hearing would be held and that the date for the hearing would be set as soon as the underlying criminal trial was completed. Petitioner was advised of her right to have counsel present and was told to either obtain counsel for the hearing or to represent herself. She was further informed that anything she said in response to the court's notification of the hearing would be held against her. Petitioner then explained that her client had handed her a card, apparently positing that what had appeared to be a question regarding her client's height had instead been an exclamation over the contents of the card. Following a brief further discussion and a recess, the Phillips' trial recommenced. (Appendix D, petitioner's petition for writ of certiorari).

Subsequently, the State rested its case-in-chief and the jury was dismissed for the night. Following the denial of the defendant's motion for judgment of acquittal, the petitioner apologized to the court for her previous conduct. The trial court reiterated that the matter of contempt would be taken up at the conclusion of the trial. (Appendix D, petitioner's petition for writ of certiorari). At the conclusion of the trial on May 26, 1983, the hearing on the contempt charges was scheduled for June 7, 1983.

On June 7, 1983, a hearing was held on the issue of contempt. Initially, the trial court advised the defendant of the conduct which had been considered to constitute contempt. That conduct was:

> (I) Her refusal to heed numerous admonitions not to override the court as the court attempted to rule on the State's objection;
>
> (II) The fact that following the testimony of a fact witness regarding the rapist's height, as the jury was leaving for a recess but while at least five jurors remained in the courtroom, petitioner stood facing her client and loudly asked

him his height, saying "How tall are you, six three?". The court noted that her client responded loudly in the affirmative, and also noted that that exchange had occurred in close proximity to the jurors. The judge stated that the remarks were particularly significant since it was apparent from voir dire and from the defendant's past record that the defendant would not take the stand and that his actual height would, therefore, not have been presented to the jury by any proper means;

(III) And, during the State's closing argument in rebuttal, petitioner, who was facing the jury, made several hand signals to the jury, and on one occasion stood silently for several second with her arms extended in a crucifixion stance. (Appendix C, petitioner's petition for writ of certiorari).

Following the explanation of the factual bases for the contempt hearing, the trial court asked petitioner if she wished to address the court. In response, petitioner made a general denial of misconduct and a specific denial of having made any hand signals. With respect to the statement about height, she asserted that it was inadvertent and arose out of her normal practice of having her client stand as the jury left the courtroom, and having her client's write on cards any information they wanted to discuss with her to preserve her concentration. Petitioner further stated that her remark about her client's height was an exclamation made upon reading such a card, as opposed to an inquiry of him regarding his height. (Appendix C, petitioner's petition for writ of certiorari).

Thereafter the trial court found the petitioner quilty of contempt of court, and fixed her punishment at a fine of fifty ($50.00) dollars and ten (10) days in jail, with all but two (2) days being suspended and with permission granted to serve the time on designated weekend. (Appendix C, petitioner's petition for writ of certiorari).

On June 10, 1983, the petitioner filed a Motion to Reconsider and Set Aside Judgment of Conviction for Contempt or to Reduce Punishment Prescribed. The motion was filed on behalf of the petitioner by counsel. A hearing on the motion was set for June 13, 1983, but on application of the petitioner, the cause was reset to June 15, 1983. On June 13, 1983, an order was entered allowing the petitioner to review tape recordings of the court proceedings at which the behavior which was the subject of the contempt action occurred.

On June 15, 1983, an affidavit of the petitioner was filed on her behalf. On the same date, petitioner filed a Motion for Certification of Conduct Constituting Contempt and Rehearing. A hearing was conducted on June 15, 1983. Counsel for petitioner stated that he had filed the Motion for Certification of Conduct pursuant to Rule 42(a), Tennessee Rules of Criminal Procedure. He explained the grounds for the motion and the petitioner's position on the conduct which was the basis for the finding of contempt. Thereafter, the trial court denied the Motion for Certification and Rehearing, explaining in detail his finding of contempt. In lieu of bond, the defendant was released on her own recognizance.

On June 15, 1983, the defendant filed her notice of appeal to the Court of Criminal Appeals of Tennessee. On March 15, 1984, following briefing and oral argument of the case, that court issued an opinion affirming the decision of the trial court. (Appendix B, petitioner's petition for writ of certiorari). The petitioner sought permission to appeal the decision of the intermediate appellate court to the Tennessee Supreme Court. On June 4, 1984, permission to appeal was denied by *per curiam* order of the State Supreme Court. (Appendix A, petitioner's petition for writ of certiorari).

REASONS FOR DENYING THE WRIT

The respondent insists that the instant petition for writ of certiorari should be denied since the judgment of the Tennessee Court of Criminal Appeals in the present case does not involve any federal question of substance, not heretofore determined by this Court, or not decided in accordance with applicable decisions of this Court. *See* Supreme Court Rule 17.1.

There being no special and important reasons for the granting of certiorari in this case, the Court should, in its sound judicial discretion, deny the writ sought here.

A.

In the first question presented to this Court by petitioner, petitioner contends that she was denied due process when the trial judge erred in not recusing himself pursuant to rule 42(b), Tennessee Rules of Criminal Procedure, which provides for recusal from a hearing on criminal contempt if the contumacious behavior involves disrespect to or criticism of the trial judge.

The Tennessee Court of Criminal Appeals found as follows on this issue:

> Further, we do not view the appellant's contemptuous acts as involving disrespect or criticism of the trial judge; thus, Rule 42(b) did not require that the judge disqualify himself from hearing the matter. The record shows that the appellant did not object to Judge Axley presiding over the hearing. Further, we note that at the argument of this case the appellant's counsel stated that he recognized that there was no merit to this complaint and that he no longer desired to pursue it.

(Appendix B, pages 10, 11, appendix to petition for writ of certiorari). The respondent contends that the Tennessee courts correctly concluded that the petitioner's conduct in interrupting

the trial judge did not constitute the kind of disrespect or criticism contemplated by Rule 42(b), Tennessee Rules of Criminal Procedure. The relevant behavior of petitioner involved her repeated interruptions of the trial judge as he attempted to rule on objections made by the State.

It is clear from the reading of the record (Appendix D to petition for the writ of certiorari) that the contumacious conduct arose from an improper overzealousness in the respresentation of her client, and not from any design to impugn the integrity, ability, or authority of the trial judge. This interpretation is entirely consistent with petitioner's explanation to the trial court that her conduct resulted from concentration and not from disrespect. (Appendix D, page 28, petition for writ of certiorari). Since the petitioner's improper conduct was not a personal attack on the trial judge, the Court of Criminal Appeals correctly found that he was not required to recuse himself.

The requirement of disqualification appears to be a flexible one which is committed to the sound discretion of the trial judge. *See Cooke v. United States,* 267 U.S. 517, 539, 45 S.Ct. 390, 396, 69 L.Ed. 767 (1925) (cited in Notes of Advisory Committed of Rules, Rule 42, Federal Rules of Criminal Procedure, after which Rule 42, Tennessee Rules of Criminal Procedure, is patterned). The cases in which an abuse of that discretion have been found, relied upon by the petitioner, unfailingly involves situations which a trial court was the victim of personal attacks or innuendos and/or engaged in prolonged or repeated verbal wrangling with the contemptor. *See Offut v. United States,* 348 U.S. 11, 99 L.Ed. 11, 75 S.Ct. 11 (1954); *United States v. Combs,* 390 F.2d 426 (6th Cir. 1968); *Cooke v. United States, supra.*

In the case at bar, there is no reasonable way the petitioner's conduct can be characterized as demonstrating animosity toward the trial judge. Moreover, one must reach equally far to contend that the trial judge treated the interruptions as personal

attacks upon him at the expense of conventional judicial demeanor. Clearly, the Tennessee courts were correct in determining that the trial judge did not err in failing to recuse himself, and the petitioner was not thereby denied due process.

Finally, the Court of Criminal Appeals correctly noted that Rule 42(b), Tennessee Rules of Criminal Procedure provides for disqualification in appropriate circumstances except where the contemptor consents that the trial judge preside. Significantly, in the case at bar, at no time prior to the adjudication of contempt on June 7, 1983, did the petitioner object to the trial judge presiding over the contempt hearing.

Thus, the respondent contends that the state courts have correctly concluded that the trial judge did not err in not recusing himself, and the petitioner has therefore not been denied due process.

B.

The petitioner also contends that she was denied due process because the trial judge failed to notify her of all the conduct which was to be considered at the contempt hearing.

The petitioner contends that the trial judge deprived her of due process by failing to provide her with a certification of personal observation of the contumacious conduct. However, as the Court of Criminal Appeals of Tennessee correctly concluded, such a certification is required only when the contempt is punished summarily, and the petitioner's contempt was not punished summarily since it was conducted upon notice and hearing, as provided in Rule 42(b). (Appendix B at page 8, appendix to petition for writ of certiorari). Since the petitioner's contempt proceeding was not disposed of summarily, the authority relied upon by the petitioner, *Taylor v. Hayes,* 418 U.S. 483, 489, 94 S.Ct. 2697, 2703, 41 L.Ed.2d 897 (1974), is not applicable, since the adjudication of contempt in that case was made summarily, the defendant having been ordered not to

speak in his defense and having been threatened with being gagged.

As set forth in the statement of the case hereinabove, the adjudication of contempt with respect to the petitioner was made after explicit notice, delay for preparation, a hearing, and an additional hearing on post-adjudication motions. Clearly, the petitioner cannot be said to have been denied due process.

Thus, the respondent contends that the Tennessee courts were correct in concluding that the trial judge provided the petitioner with adequate notice and hearing with respect to the charge of criminal contempt.

CONCLUSION

For the foregoing reasons, the respondent respectfully requests that the petition for the writ of certiorari be DENIED.

Respectfully submitted,

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